

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 119 Searches and Seizures
SPONSOR(S): Criminal Justice Subcommittee; Workman
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 92

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	13 Y, 0 N, As CS	Jones	Cunningham
2) Local & Federal Affairs Committee			
3) Judiciary Committee			

SUMMARY ANALYSIS

The bill creates the “Freedom from Unwarranted Surveillance Act” (Act), which prohibits a law enforcement agency from using a drone to collect evidence or other information.

The bill provides the following three exceptions that allow a law enforcement agency to use a drone:

- To counter a high risk of a terrorist attack by a specific individual or organization if the United States Secretary of Homeland Security determines that credible intelligence indicates that there is such a risk;
- If a law enforcement agency obtains a search warrant to use the drone; or
- If a law enforcement agency has a reasonable suspicion that under particular circumstances, swift action is necessary to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or the destruction of evidence.

Evidence gathered in violation of the Act is inadmissible in a criminal prosecution in any state court. The bill allows for a civil action to be brought against a law enforcement agency who violates the Act. The bill defines the terms “drone” and “law enforcement agency”.

The bill may have a negative fiscal impact on state and local expenditures on law enforcement agencies who violate the Act as they could be subject to civil penalties.

The bill becomes effective July 1, 2013.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Drones

Drones, also known as Unmanned Aircraft Systems (UAS), are unmanned aircraft that can be flown by remote control or on a predetermined flight path.¹ The size of a drone varies - they can be as small as an insect and as large as a jet.² Drones can be equipped with various devices such as infrared cameras,³ license plate readers,⁴ and "ladar" (laser radar).⁵ It has been reported that in 2011, the U.S. Army contracted with two corporations to develop facial recognition and behavioral recognition technologies for drone use.⁶

There are three major markets for drones: military, civil government, and commercial.⁷ The majority of drones are operated by the military and have a small impact on U.S. airspace.⁸ However, drone use in the U.S. is increasing because of technological advances.⁹ In 2010, the Federal Aviation Administration (FAA) estimated that there will be 30,000 drones in U.S. airspace within the next twenty years.¹⁰

Non-Military Drone Use

The FAA, which first allowed drones in U.S. airspace in 1990, is in charge of overseeing the integration of drones into U.S. airspace.¹¹ In doing so, it has to balance the integration of drones and the safety of the nation's airspace.¹² To safeguard the U.S. airspace, the FAA limits drone use to public interest missions such as fighting fires, search and rescue, scientific research, and environmental monitoring by National Aeronautics and Space Administration (NASA) and National Oceanic and Atmospheric Administration (NOAA).¹³ In 2004, the U.S. Customs and Border Patrol (Border Patrol) began utilizing drones to monitor the borders.¹⁴ In 2010, the Border Patrol expanded its use of drones to monitor Florida's shorelines.¹⁵ The FAA has also limited the type of airspace that drones are able to operate in. Currently drones are not allowed to operate in Class B airspace, which is the airspace over the major urban areas and where the largest amount of manned aircraft is flown in the U.S.¹⁶

¹ *Drones in Domestic Surveillance Operations*, Congressional Research Service, September 6, 2012, www.fas.org/sgp/crs/natsec/R42701.pdf (last visited on January 28, 2013).

² See CRS Report R42136. *U.S. Unmanned Aerial Systems*, Jeremiah Gertler.

³ *US Army unveils 1.8 gigapixel camera helicopter drone*, BBC NEWS, December 29, 2011, <http://www.bbc.com/news/technology-16358851> (last visited on January 28, 2013).

⁴ See Draganflyer X6, Thermal Infrared Camera, <http://www.draganfly.com/uav-helicopter/draganflyer-x6/features/flir-camera.php> (last visited on January 28, 2013).

⁵ *Unmanned Aerial Vehicles Support Border Security*, Customs and Border Protection Today, July 2004, www.cbp.gov/xp/CustomsToday/2004/Aug/other/aerial_vehicles.xml (last visited on January 28, 2013).

⁶ *Army Developing Drones That Can Recognize Your Face From a Distance And even recognize you intentions*, Clay Dillow, Popular Science, September 28, 2011, <http://www.popsci.com/technology/article/2011-09/army-wants-drones-can-recognize-your-face-and-read-your-mind> (last visited on January 28, 2013).

⁷ Federal Aviation Administration, *FAA Aerospace Forecast: Fiscal Years 2010-2030* at 48 (2010).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Public Law 112-95, February 14, 2012, The FAA Modernization and Reform Act of 2012; FAA Fact Sheet, *Unmanned Aircraft Systems*, December 14, 2012, http://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=14153 (last visited on January 28, 2013).

¹² FAA Fact Sheet, *Unmanned Aircraft Systems*, December 14, 2012, http://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=14153 (last visited on January 28, 2013).

¹³ *Id.*

¹⁴ *Supra* note 5.

¹⁵ *Space Florida Probing Drone's Future Potential*, Howard Altman, Tampa Bay Online, August 5, 2012.

<http://www2.tbo.com/news/breaking-news/2012/aug/05/space-florida-probing-drones-future-potential-ar-453511/> (last visited on January 18, 2013).

¹⁶ *Supra* note 7.

FAA approval is necessary to operate a drone for non-military purposes and there are two ways to receive approval.¹⁷ The first is to receive a private sector experimental airworthiness certificate that allows for research, development, training, and flight demonstrations.¹⁸ The second is to obtain a Certificate of Waiver of Authorization (COA) which allows public entities, including governmental agencies, to fly drones in civil airspace.¹⁹ An agency seeking a COA must apply online and detail the proposed operation for the drone.²⁰ If the FAA issues a COA, it contains a stated time period (usually two years) a certain block of airspace for the drone, and other special provisions unique to the specific operation.²¹ As of November 2012, there were 345 active COAs.²²

FAA Modernization Reform Act of 2012

In February 2012, Congress passed the FAA Modernization Reform Act (Reform Act) which requires the FAA to safely integrate drones into U.S. airspace by September 2015.²³ The Reform Act authorizes the FAA to allow government public safety agencies to operate drones under certain restrictions and made the process for approving authorization requests more efficient.²⁴ The restrictions are that drones must be flown within the line of sight of the operator, less than 400 feet above the ground, during daylight conditions, inside Class G (uncontrolled) airspace, and more than five miles from any airport or other location with aviation activities.²⁵ The Reform Act also instructs the FAA to develop operation standards and certification criteria for drones and conduct studies concerning the safe use of drones.²⁶

There have been some issues implementing the Reform Act. The FAA recently delayed the selection of six drone safety testing sites, mandated by the Reform Act, because of privacy concerns with integrating drones into U.S. airspace.²⁷ In a letter to Congressional Unmanned Systems Caucus, FAA acting chief Michael Huerta addressed the delay and said "...[I]ncreasing the use of UAS [drones] in our airspace also raises privacy issues, and these issues will need to be addressed as unmanned aircraft are safely integrated."²⁸ The Reform Act does not address privacy concerns and it is not clear if the FAA will attempt to address privacy issues through drone operational standards or studies required by Reform Act.²⁹

In response to the Reform Act, U.S. Senator Rand Paul filed legislation entitled "Preserving Freedom from Unwarranted Surveillance Act of 2012."³⁰ Senator Paul's legislation, which is essentially identical to the bill, did not become law.³¹

¹⁷ *Supra* note 12.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Public Law 112-95, February 14, 2012, The FAA Modernization and Reform Act of 2012; *Drones in Domestic Surveillance Operations*, Congressional Research Service, September 6, 2012, www.fas.org/sgp/crs/natsec/R42701.pdf (last visited on January 28, 2013).

²⁴ Public Law 112-95, February 14, 2012, The FAA Modernization and Reform Act of 2012; *FAA Makes Progress with UAS Integration*, Federal Aviation Administration, May 14, 2012, www.faa.gov/news/updates/?newsId=68004 (last visited on January 28, 2013).

²⁵ Public Law 112-95, February 14, 2012, The FAA Modernization and Reform Act of 2012.

²⁶ *Id.*

²⁷ Public Law 112-95, February 14, 2012, The FAA Modernization and Reform Act of 2012; *FAA Going Slow on Drones as Privacy Concerns Studied*, Alan Levine, Bloomberg, November 26, 2012, <http://go.bloomberg.com/political-capital/2012-11-26/faa-going-slow-> (last visited on January 22, 2013).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Preserving Freedom from Unwarranted Surveillance Act of 2012*, S.3287, H.R. 5925.

³¹ Govtrack.us <http://www.govtrack.us/congress/bills/112/s3287> (last visited on January 24, 2013).

Drone use by Law Enforcement Agencies in Florida

The Miami-Dade Police Department, Orange County Sheriff's Office, and Polk County Sheriff's Office are law enforcement agencies in Florida that have obtained a COA from the FAA and purchased drones.³²

- The Miami-Dade Police Department's COA became effective on July 1, 2011. Their drones have not been flown in an actual operation.³³
- The Polk County Sheriff's Office determined that the expense of training pilots to operate the drone were too high and have discontinued the use of the drone.³⁴
- The Orange County Sheriff's Office is currently experimenting with their drones.³⁵ The Orange County Sheriff's Office needs permission from the Orange County Commission before the drones can be put to use, and hopes to launch the drones by the summer of 2013.³⁶

Several Police Chiefs who do not have COAs and who have not started drone testing have indicated that drone use would benefit their agencies by reducing the risk to officers and citizens in high risk situations involving hostages, active shooters, or armed and barricaded suspects.³⁷

Effect of the Bill

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The bill provides the following three exceptions that allow a law enforcement agency to use a drone:

- To counter a high risk of a terrorist attack by a specific individual or organization if the United States Secretary of Homeland Security determines that credible intelligence indicates that there is such a risk;
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Evidence obtained in violation of the Act is inadmissible in a criminal prosecution in any state court. The bill authorizes an aggrieved party to initiate a civil action against a law enforcement agency who violates the Act to obtain all appropriate relief that will prevent or remedy the violation.

The bill provides the following definitions:

- "Drone" means a powered, aerial vehicle that:
 - Does not carry a human operator;
 - Uses aerodynamic forces to provide vehicle lift;
 - Can fly autonomously or be piloted remotely;
 - Can be expendable or recoverable; and
 - Can carry a lethal or nonlethal payload.
- "Law enforcement agency" means a lawfully established state or local public agency that is responsible for the prevention and detention of crime, local government code enforcement, and the enforcement of penal, traffic, regulatory, game, or controlled substance laws.

B. SECTION DIRECTORY:

³² FAA Drones COA, <https://www.eff.org/file/34697#page/1/mode/1up> (last visited on January 23, 2013).

³³ Miami-Dade Police Department Fact Sheet, Special Patrol Bureau/Aviation Unit, Micro Air Vehicle "MAV" Program, provided to Senate Committee Staff, January 8, 2013 (on file with the Criminal Justice Subcommittee).

³⁴ *Central Florida Sheriff Wants to Fly Drones by the Summer*, Aero News Network, January 16, 2013, <http://www.aero-news.net/getmorefromann.cfm?do=main.textpost&id=2ee04d46-6fe7-4f65-bae5-c843dce80ab5> (last visited on January 24, 2013).

³⁵ *Orange sheriff: Drones won't be used for spying*, Dan Tracy, Orlando Sentinel, January 18, 2013, <http://www.orlandosentinel.com/news/local/breakingnews/os-orange-sheriff-drone-flies-20130118.0,6760531.story> (last visited on January 24, 2013).

³⁶ *Id.*

³⁷ Memo provided to Senate Committee Staff on December 12, 2012 by the Florida Police Chiefs Association (on file with the Criminal Justice Subcommittee).

Section 1. Creates an unnumbered section of statute relating to searches and seizure using a drone.

Section 2. Provides an effective date of July 1, 2013.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill authorizes an aggrieved party to initiate a civil action against a state law enforcement agency who violates the Act to obtain all appropriate relief that will prevent or remedy the violation. The remedy could result in monetary damages, which would have a negative fiscal impact on state government expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill authorizes an aggrieved party to initiate a civil action against a local law enforcement agency who violates the Act to obtain all appropriate relief that will prevent or remedy the violation. The remedy could result in monetary damages, which would have a negative fiscal impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

Currently, law enforcement can use drones, but must first obtain a COA and use the drone as specified in the COA. When doing so, the drone must be used within the confines of the Fourth Amendment.

The Fourth Amendment of the United States Constitution guarantees the people in this country security in their houses, persons, papers, and possessions from unreasonable searches and seizures by government actors.³⁸ Article 1, Section 12 of the Florida Constitution contains the same

³⁸ The text of the Fourth Amendment provides:

guarantees; however the Florida Constitution provides more protections by specifically extending the Fourth Amendment to protect private communications.

The U.S. Supreme Court has yet to hear a case that addresses the Fourth Amendment as it relates to a search conducted by a drone. However, some guidance is found in the Court's rulings in cases involving aerial searches by law enforcement officers in manned aircraft.

In *California v. Ciraolo* and *Florida v. Riley*, police received anonymous tips that marijuana was growing in the defendants' backyards.³⁹ Police were unable to see into the backyards, so they used planes to fly at altitudes of 400 and 1,000 feet over the yards and saw marijuana plants growing.⁴⁰ The Court held that the naked eye aerial observation of the backyards did not constitute a search and did not violate the Fourth Amendment.⁴¹ Similarly, in *Dow Chemical v. United States*, the Court addressed the issue of whether "industrial curtilage" would prevent the government from conducting aerial surveillance over one of Dow's plants.⁴² The Court again found that such aerial inspection of the plant was not a search under the Fourth Amendment.⁴³

If the use of a drone were challenged as being in violation of the Fourth Amendment, the Court's analysis would likely be similar to that of manned aircraft. If a drone was used in a manner that has been held constitutional as applied to manned aircraft, its use would likely not be considered a search and would therefore not require a warrant.

The bill requires law enforcement to obtain a search warrant before using a drone in any way.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 7, 2013, the Criminal Justice Subcommittee adopted two amendments and reported the bill favorable as a committee substitute. The amendments added additional exceptions to the prohibition on using drones and amended the definition of "law enforcement agency."

This analysis is drafted to the committee substitute as passed by the Criminal Justice Subcommittee.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

³⁹ *California v. Ciraolo*, 476 U.S. 207 (1986); *Florida v. Riley*, 488 U.S. 445 (1989).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Dow Chemical Company v. United States*, 476 U.S. 227 (1986).

⁴³ *Id.*